

Office of Chief Counsel
Internal Revenue Service

memorandum

CC:LM:HMT:CLE:PIT:POSTF-134850-02

DPLeone

date: August 14, 2002

to: Gary O'Shell: LMSB 1454

from: Assoc. Area Counsel (CC:LM:HMT:CLE:PIT)

subject: [REDACTED] INC. - [REDACTED]
Statute Extension - Dissolved FSC - Laws of [REDACTED]
Supplementary Advice to our July 25, 2002 advice

As stated in our memorandum of advice dated July 25, 2002, our advice was subject to 10-day post review by our National Office. This review has been completed. The National Office agrees with our advice. However, it was recommended that the following be added as a new second paragraph in the discussion portion of our memorandum:

Section 6501(a) provides that, except as otherwise provided, tax must be assessed within 3 years after the return was filed, whether or not such return was filed on or after the date prescribed. As an exception, section 6501(c)(4) provides that the Service and a taxpayer may enter into a written agreement to extend the limitations period, provided the agreement is executed before the expiration of the period of limitations prescribed by section 6501(a). Therefore, a consent to extend [REDACTED]'s statute of limitations may not be solicited after the statute of limitations for assessment under section 6501 has expired. See also Temp. Treas. Reg. sec. 1.925(a)-1T(e)(4) (stating that a determination of FSC income 'by the Commissioner may only be made if specifically permitted by a Code provision or regulations under the Code.') Accordingly, the winding-up period notwithstanding, the consent must be sought prior to the expiration of the statute of limitations under section 6501.

Finally, since [REDACTED] Inc. delinquently filed its return for the tax period ended March 31, [REDACTED] on [REDACTED], the statute of limitations, if not extended, will expire on [REDACTED].

This writing may contain privileged information. Any unauthorized disclosure of this writing may have an adverse effect on privileges, such as the attorney client privilege. If disclosure becomes necessary, please contact this office for our views.

We are closing our case at this time. Please contact Donna P. Leone at 412-644-3442 if you have any questions.

RICHARD S. BLOOM
Associate Area Counsel
(Large and Mid-Size Business)

By: 

DONNA P. LEONE
Senior Attorney (LMSB)

Office of Chief Counsel
Internal Revenue Service

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subject: [REDACTED], INC. - [REDACTED]
Statute Extension - Dissolved FSC - Laws of [REDACTED]

This is in response to your request for advice dated June 14, 2002. The advice rendered in this memorandum is conditioned upon the accuracy of the facts provided by you. This memorandum should not be cited as precedent. This memorandum is subject to 10-day post review by our National Office and, therefore, may be modified. Please contact our office upon expiration of the 10-day post review period, or after August 5, 2002, before acting upon the advice contained herein.

ISSUES

1. What is the proper entity to execute a consent to extend the statute of limitations for assessment for [REDACTED], Inc., a foreign sales corporation dissolved under the laws of the [REDACTED] on [REDACTED], for the tax year ended March 31, [REDACTED]? How should the consent be captioned?

2. Is there potential transferee liability and, if so, what steps should be taken by the agent to protect the Internal Revenue Service's ability to pursue transferee liability?

ANSWERS

1. A consent can be obtained from [REDACTED], Inc. (hereinafter "[REDACTED]"). The consent should be signed by an official of [REDACTED] who possesses the authority to act for that corporation under [REDACTED] law. It is not sufficient to have an officer of the former parent, [REDACTED], Inc., formerly known as [REDACTED] Inc., sign the consent. The consent should be captioned in the name of the FSC as it appears on the return: [REDACTED] Inc. We recommend that you secure an affidavit from [REDACTED] setting forth the underlying facts which establishes that the person who signs the consent for [REDACTED] has the authority to sign the consent on behalf of the FSC.

2. There is potential transferee liability, and steps should be taken to protect that liability. First, while securing a consent from [REDACTED] may have limited practical significance after the two-year winding up period expires on [REDACTED], when [REDACTED] will cease to exist for all purposes, pursuant to [REDACTED] law, the consent will also serve to extend the statute of limitations against any third parties that may be liable as transferees. A consent extending the statute of limitations on assessment for a taxpayer also extends the statute of limitations for transferees. Accordingly, securing a consent from [REDACTED] is a step that should be taken.

Second, we recommend that you also secure at the present time a consent on a Form 977 to extend the time to assess liability against a transferee, and a transferee agreement on a Form 2045, from [REDACTED] Inc., formerly known as [REDACTED] Inc. ("[REDACTED]") to protect the statute of limitations on any potential transferee liability that [REDACTED] may have incurred as the sole shareholder of [REDACTED].

The Form 977 should have the name of the transferee as "[REDACTED] Inc. (EIN: [REDACTED], formerly known as [REDACTED] Inc." The liability at law should be identified as the one imposed against or due from "[REDACTED], Inc. (EIN: [REDACTED])".

FACTS

[REDACTED], Inc. (EIN: [REDACTED], incorporated under the laws of [REDACTED] on [REDACTED], delinquently filed a Form 1120-FSC, U.S. Income Tax Return of a Foreign Sales Corporation for the tax year ended March 31, [REDACTED] on [REDACTED].

On [REDACTED], pursuant to The Companies Act of [REDACTED], Inc., identified as the sole shareholder of [REDACTED], resolved that [REDACTED] be dissolved pursuant to Section 364 of the Companies Act and that any director of [REDACTED] was authorized and directed on behalf of the shareholder to sign and send Articles of Dissolution to the Registrar of Companies.

A copy of the Articles of Dissolution for [REDACTED] has not been provided, so we do not know who was the authorized director

¹ For reasons that are unknown to us, the resolution did not reflect the fact that [REDACTED] had changed its name to [REDACTED].

for [REDACTED] who filed the resolution. However, a Form 24, Companies Act of [REDACTED], Certificate of Dissolution has been provided, which indicates that [REDACTED] was dissolved under the Companies Act pursuant to Section 363, 364 or 366 as set out in the attached Articles of Dissolution. The date of dissolution was [REDACTED].

At the close of the tax year ended March 31, [REDACTED], and at the time of dissolution, the sole shareholder of [REDACTED] was [REDACTED], Inc. (EIN: [REDACTED]), formerly known as [REDACTED], Inc.

[REDACTED]

DISCUSSION

A foreign sales corporation (FSC) is, by definition, a corporation organized pursuant to the laws of a qualified foreign country or U.S. possession. I.R.C. § 922(a)(1)(A). Because a FSC is organized under the laws of a foreign country or a U.S. possession, it cannot be part of its U.S. parent's consolidated group. I.R.C. §§ 922(a)(1)(A); 1504(a)(1), (b)(3). Thus, it is not appropriate to obtain a consent to extend the period of limitations for assessment with respect to a FSC from the U.S. parent. Rather, a consent should be solicited directly from the FSC and signed by a corporate official authorized to act on behalf of the FSC. Generally, the corporate existence of a FSC is respected for U.S. tax purposes, including periods of limitation. See generally, Union Carbide Corp. v. Commissioner 110 T.C. 375 (1998).

² It is our understanding that the Form 1120-FSC was going to be finalized and filed shortly. While it is unlikely that our advice would change, the agent should verify that the return as filed is consistent with the draft copy previously provided and contact our office if there are any variances.

The continuing existence of a dissolved corporation and the legal possibility of executing a consent to extend the statute of limitations on assessment for such corporation depends upon the law of the place of its incorporation. See, United States v. Krueger, 121 F.2d 842, 845 (3rd Cir.), cert. denied, 314 U.S. 677 (1941). In the instant case, the law of [REDACTED] applies.

Under § [REDACTED] of the Companies Act [REDACTED] of the Laws of [REDACTED] (hereinafter "Companies Act"), a company that has no property and no liabilities may be dissolved by special resolution of its shareholders. Such a resolution was adopted by [REDACTED] as sole shareholder of [REDACTED]. In accord with the shareholder resolution, articles of dissolution were apparently filed with the Registrar of [REDACTED], pursuant to § 365(1) of the Companies Act. The Registrar thereupon, as required by § 365(2) of the Companies Act, issued a certificate of dissolution on [REDACTED]. Under § 365(3) of the Companies Act, a company ceases to exist upon issuance of a certificate of dissolution. Thus, [REDACTED] ceased to exist as of [REDACTED].

However, under § [REDACTED] of the Companies Act, a civil, criminal, or administrative action or proceeding may be brought against a company within two years after its dissolution, as if the company had not been dissolved. Accordingly, there is a two-year winding up period following dissolution during which an action may be brought against a dissolved company. This two-year period is set to expire with respect to [REDACTED] on [REDACTED]. A consent to extend the statute of limitations may be solicited from [REDACTED] during this period. Cf., Associates Investment, Co. v. Commissioner, 59 T.C. 441 (1972) (a consent was held to be valid under Nebraska law which provided for a similar post-dissolution period for bringing an action against a dissolved corporation); Badger Materials, Inc. v. Commissioner, 40 T.C. 1061 (1963) (similar holding under Wisconsin law); Rev. Rul. 71-467, 1971-2 CB 411 (Connecticut law). The consent should be signed by an officer of [REDACTED] who possesses authority to act for the corporation. Under § 2 of the Companies Act, an "officer" of a [REDACTED] company includes, among others, the managing director, general manager, comptroller, secretary, or treasurer.

Although a consent may still be obtained from [REDACTED] such consent would have no practical legal effect with respect to [REDACTED] after [REDACTED] when the company will cease to exist for all purposes. A consent will not initiate a civil, criminal or administrative proceeding which would extend the corporate existence of the company. Cf., Badger Materials, Inc. v. Commissioner, 40 T.C. 1061, 1063 (1963); Wheeler's Peachtree

Pharmacy v. Commissioner, 35 T.C. 177 (1960), acq., 1961-2 C.B. 5; Ross v. Venezuelan-American Independent Oil Producers Ass'n, Inc., 230 F. Supp. 701, 702 (D. Del. 1964); Field v. Commissioner, 32 T.C. 187 (1959), aff'd per curiam, 286 F.2d 960 (6th Cir. 1960), cert. denied, 366 U.S. 949 (1961).

Thus, as of [REDACTED], even if a consent is obtained, the corporate existence of [REDACTED] will terminate, along with the authority of all of its officers and directors. This means that after that date an agreement to assess any audit deficiency could not be secured, nor would there be a corporate entity against which collection action could be taken. In essence, the reason for obtaining the consent is to extend the statute of limitations for potential transferees. Under section 6901(c)(1), the statute of limitations for assessing the transferee is one year after the expiration of the period of limitations for assessment against the transferor.

For these reasons, and since [REDACTED] no longer has any assets against which collection could be taken, we also recommend that you secure a consent on Form 977 to extend the period to assess transferee liability and a transferee agreement on Form 2045 from [REDACTED] to protect the statute of limitations on any potential transferee liability that the latter may have incurred as the sole shareholder of [REDACTED]. The potential liability of [REDACTED] as a transferee depends upon several factors, including whether there is a tax liability owed by [REDACTED] for the tax year [REDACTED], and whether [REDACTED] received any distributions from [REDACTED] which rendered it insolvent.³ After audit, if you determine that there is a potential transferee liability against [REDACTED] or any other entity, we will be available to discuss this matter further.

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³ Under [REDACTED] law, a civil proceeding may be brought against a company within two years of dissolution as if the company had not been dissolved, and any property that would have been available to satisfy any judgment or order if the company had not been dissolved remains available to satisfy the judgment. Further, a shareholder to whom the property has been distributed is liable to anyone claiming in such civil suit against the company to the extent of the amount received by the shareholder upon the distribution (which action must also be brought within two years of the dissolution of the company). § [REDACTED] of the Companies Act.

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